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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARD TURON BURTON,

Defendant and Appellant.

B235104

(Los Angeles County
Super. Ct. No. BA373315)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Bernard Turon Burton of second degree robbery. Burton appeals, arguing that the verdict should be reversed because the trial court failed to conduct a hearing after a juror fell asleep. We affirm.

BACKGROUND

An information filed September 10, 2010 charged Burton with second degree robbery in violation of Penal Code¹ section 211. The information also alleged that Burton had five prior robbery convictions, pursuant to sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d). Burton pleaded not guilty and denied the special allegations.

The first jury trial ended in a hung jury as to Burton, with eight jurors voting not guilty and four jurors voting guilty. The jury found Burton's codefendants, Hilton Howard and Trayvion Fermon, guilty of second degree robbery. Burton was retried, and a jury convicted Burton of second degree robbery in the second trial. Burton waived his right to a jury trial on his priors.

The trial court sentenced Burton to 35 years to life. The sentence consisted of 25 years to life for the robbery and two consecutive sentences of five years each for Burton's two prior robbery convictions.

Burton filed a timely notice of appeal.

FACTS

At trial, Guadalupe Pineda testified that on July 6, 2010, she and Cristina Aguilar were working at a cell phone store. While watching a soccer game, they noticed two men walking by and eyeing the store. The men then entered the store and surrounded Pineda behind the counter. Aguilar escaped the store. The men proceeded to demand money from Pineda, who pointed to a drawer containing the store's cash. After emptying the drawer of approximately \$400-\$500 in cash, the men began to exit the store. As the men were leaving, Pineda tried to move past them further into the store; one of the men

¹ All future statutory references are to the Penal Code, unless otherwise indicated.

punched her in the face. The men then ran out of the back of the store. Several local businessmen chased after the two men. Aguilar called 911.

Los Angeles Police Department (LAPD) Officer Anthony Cole testified that while driving a marked police vehicle, he received a radio call about a robbery suspect that described the suspect's vehicle as a black Chevrolet Suburban or Tahoe driven by a black male. A later call provided Officer Cole with a partial license plate number. As Officer Cole drove south, he encountered a Tahoe matching the call's description, including a matching partial license plate number, just a few blocks away from the crime scene. Officer Cole followed the car for more than a block. As he sped up to catch the Tahoe, it pulled over to the side. Burton was driving the car.

Howard exited the vehicle and began to walk away. Burton then exited the vehicle, followed by Fermon. Officer Cole and his fellow officers detained and handcuffed Burton and his codefendants. Officer Cole looked through the car windows and noticed a blue satchel with cash stuffed inside.

LAPD Detective Chris Marsden testified that he soon arrived at the location where Burton and his codefendants were detained. Detective Marsden searched the satchel, finding approximately \$530 in cash and paperwork bearing Burton's name. Detective Marsden returned to the cell phone store and other officers brought Pineda to the detention scene in a squad car. Pineda testified that she was unable to identify the defendants from the squad car at the distance they were presented to her. Officers then brought Aguilar to the detention scene, also in a squad car. Aguilar testified that she was likewise unable to identify the defendants from inside the squad car and at the distance they were presented to her. At trial, Pineda identified Howard and Fermon as the robbers from a surveillance video. Later, at trial, Aguilar identified Howard from a photograph as one of the robbers.

Detective Marsden testified that he observed surveillance cameras overlooking the incident. He reviewed the surveillance video the next day and observed Howard and Fermon exiting a black Chevy Tahoe. Detective Marsden also identified Howard and Fermon running and the local businessmen chasing after them. Detective Marsden

identified the Tahoe as the same car he saw at the detention scene. He also saw the Tahoe being driven to the back of the store. Detective Marsden then presented the evidence to the district attorney.

After the police arrested Burton, Detective Marsden interviewed Burton at the police station. Burton supplied his personal information and was apprised of his *Miranda*² rights. In that interview, Burton admitted to gambling with his codefendants and admitted his connection to the satchel. However, he denied involvement in the robbery.

During the second jury trial, after a brief recess, the trial court remarked that it had “a problem with the doctor, [juror] 18. She’s not cutting it.” Defense counsel rejoined: “She’s falling asleep.” The court then stated that “we’ll talk about that after we talk about your issue,” the issue being the redaction of Burton’s statements to Detective Marsden. Between the last recess and the court’s remarks, the jury had heard testimony from Pineda and Detective Marsden. Pineda testified as to the robbery and the in-field identification, or lack thereof, of the robbers. Detective Marsden testified as to the in-field identification of the suspects and his search of the Tahoe. No further discussion of the juror being asleep, or of the issue, appears in the record.

DISCUSSION

Burton argues that the jury verdict should be reversed because the juror committed juror misconduct by falling asleep, thereby depriving him of his right to a fair and impartial jury trial. We reject this argument and affirm the judgment.

Respondent argues that Burton has forfeited the issue of juror misconduct on appeal by failing to seek a remedy in the trial court. We do not see it this way.

Burton has not forfeited the issue of juror misconduct on appeal since defense counsel raised the issue with the trial court. In order to preserve the issue for appeal, the appellant must “seek the juror’s excusal or otherwise object to the court’s course of

² *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

action.” (*People v. Holloway* (2004) 33 Cal.4th 96, 124, see also *People v. Majors* (1998) 18 Cal.4th 385, 428.)

Here, the record shows that defense counsel raised the issue by commenting that the juror was “falling asleep.” The trial court noted the objection by saying they would “talk about that after we talk about your [redaction] issue.” Since defense counsel raised the issue, which was never resolved by the trial court, we conclude Burton has preserved the issue for appeal.

However, we conclude the trial court was not required to hold a formal hearing regarding the sleeping juror. While “it is the court’s duty ‘to make whatever inquiry is reasonably necessary’ to determine whether a juror should be discharged,” where the court is “put on notice that good cause to discharge a juror may exist . . . the mere suggestion of juror ‘inattention’ does not require a formal hearing.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348 (*Bradford*), quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 821.) Indeed, “the failure to conduct a formal hearing” on possible juror misconduct “is not always error.” (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1234.) The California Supreme Court has held that a court’s directed inquiry, short of a formal hearing, was sufficient and within the trial court’s discretion even though defense counsel specifically complained of jurors sleeping. (*Ibid.*) “If the trial court has good cause to doubt a juror’s ability to perform his duties, the court’s failure to conduct a hearing may constitute an abuse of discretion on review.” (*People v. Lomax* (2010) 49 Cal.4th 530, 588.)

In *Bradford*, during the cross examination of a witness, in response to an unrelated objection, the “trial court announced: ‘I’ll overrule the objection. [¶] We have a juror that’s asleep.’” When defense counsel responded that “[t]he juror was asleep all day yesterday, also,” the trial court stated: “I know.” (*Bradford, supra*, 15 Cal.4th at p. 1348.) Although the record indicated that the juror had slept on that day and appeared to have been asleep a day earlier, the court held that the trial court did not abuse its discretion in failing to conduct an inquiry. (*Ibid.*) The court observed that “courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention

which granted a new trial on that ground. . . .” (*Id.* at p. 1349, quoting *People v. Lee Yick* (1922) 189 Cal. 599, 609–610.) The court then reasoned that defense counsel’s comment about the juror, made without an accompanying assertion of juror misconduct or request for a hearing, showed that the juror’s conduct did not require a hearing. The court also reasoned that the trial court demonstrated continuous scrutiny of the attentiveness of the jury by admonishing the parties to accelerate the pace of the proceedings. The court thus held that the trial court did not abuse its discretion by not conducting an inquiry into the alleged juror misconduct. (*Bradford*, at p. 1349.)

Here, the record suggests only that juror 18 fell asleep at most once on one day, unlike the juror in *Bradford*, *supra*, 15 Cal.4th 1229, who slept for longer. The record does not indicate that the juror in the instant case continued to sleep or had been asleep in court on any occasion other than just that day. There is no mention in the record that the juror was asleep at any point in the trial prior to the trial court’s remark. Likewise, there is no mention in the record that the juror was asleep at any point after the trial court’s remark. Thus we hold that, like the trial court in *Bradford*, the trial court here did not abuse its discretion in failing to conduct an inquiry.

Furthermore, the record indicates that, like the trial court in *Bradford*, *supra*, 15 Cal.4th 1229, the trial court was aware of the possible inattentiveness of the jurors, stating earlier on the day of the remark, “Anybody needs to stand up or feel sleepy or anything, just say so . . . I don’t want to see anybody dozing. Thank you.” Along with the trial court’s later remark and lack of any other mention of juror inattentiveness, this statement suggests that, like the trial court in *Bradford*, the trial court here continuously monitored the attentiveness of the jury. We hold that the trial court thus did not abuse its discretion by omitting to conduct a hearing: the juror slept for far less time, if at all, than the juror in *Bradford* and the trial court continuously monitored the attentiveness of the jury.

If juror 18 actually slept, the record shows that she would have heard any evidence material to Burton’s case during other portions of the trial. “[C]ases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep

during material portions of the trial. [Citations.]” (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411.)

At the time the trial court mentioned the juror’s behavior, Detective Marsden was testifying about the victims’ inability to identify Burton’s codefendants at the field showup. Burton was not identified by the victims because he was the getaway driver. The victims never saw Burton during the crime. Testimony regarding Burton’s identification occurred immediately after the recess when the trial court made its remark about the sleeping juror. Since no further comment was made about juror 18 sleeping, it is an appropriate inference that she was awake and heard testimony from Detective Marsden regarding the video surveillance footage. Moreover, she would also have heard Detective Marsden’s testimony the next day tying Burton to the satchel and its contents.

Therefore, we conclude that even if the trial court erred in not conducting a hearing regarding the juror’s alleged misconduct, and even if the juror actually committed misconduct by sleeping, any error the trial court committed was harmless.

The evidence Burton points to as exculpating himself—his explanation that he did not know his acquaintances would rob the store, that the money was found near Fermon, and that Burton was not speeding and otherwise fully cooperated with the police—was presented earlier in the day by Officer Cole or was presented during the next day of testimony when the tape of Burton’s interview with Detective Marsden was played.

We recognize, however, that evidence about the robbery was presented in the period between the lunch recess and the trial court’s remarks, when the juror was allegedly falling asleep. In particular, Pineda testified about the robbery, including the amount of cash taken. She also identified the robbers in the surveillance video and testified that she was unable to identify Howard and Fermon at the field showup.

This same evidence was also presented after the trial court’s remarks. In particular, Aguilar was able to definitively identify Howard from a photograph as one of the robbers. She also testified as to the start of the robbery and to the amount of cash taken. Aguilar also testified that neither she nor Pineda was able to identify either Howard or Fermon at the field showup. Detective Marsden’s taped interview with

Burton established that the satchel contained \$530. Detective Marsden identified Howard and Fermon from the same surveillance video Pineda identified them from. He also testified that the Chevy Tahoe Howard and Fermon exited in the surveillance video matched the Tahoe he observed at the detention scene.

Thus, assuming the worst-case scenario where the juror was sound asleep from the end of the lunch recess to the moment the trial court remarked on her dozing, the juror would have heard all the material evidence during other portions of the trial. Aguilar repeated nearly all of the evidence testified to by Pineda. The surveillance video showing Howard and Fermon exiting a black Chevy Tahoe was again presented during Detective Marsden's testimony. Detective Marsden also identified Howard and Fermon from the surveillance video. Finally, Burton admitted his connection with his codefendants and the satchel and its contents in his taped interview with Detective Marsden.

The juror did not miss hearing any material evidence. Any error the trial court committed was harmless error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.